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January 2, 2001

Lois G. Lerner, Esq.
Acting General Counsel
Federal Election Commission
999 E Street, NW - 6th Floor
Washington, DC 20463

Re: MUR 5150

Dear Mr. Noble:

This letter is the response of the Missouri Democratic Party and Donna Knight, as Treasurer (together, the "Party"), to the Federal Election Commission's finding of reason to believe in MUR 5150. Because the Commission's Factual and Legal Analysis failed to present violations of the Federal Election Campaign Act, as amended, 2 U.S.C. 431 et seq. (the "Act"), the Commission should close this matter and take no further action.

Each of the principal allegations contained in the Factual and Legal Analysis is poorly grounded in law. First, the Analysis claims that the Party improperly disgorged excess federal contributions into its nonfederal account, which the Act plainly permits. Second, it claims that the Party failed to transfer portions of its vendor refunds to its nonfederal account, when the Commission's only limited guidance on this subject exists in an advisory opinion that was issued after much of the relevant conduct had occurred. Finally, it claims that the Party failed to pay certain expenses on its administrative allocation ratio, when other, more favorable allocation methods plainly could have applied.

Other circumstances weigh against the pursuit of this matter. The claim of improper allocation relies entirely on the absence of documents that the Commission's own regulations allowed the Party to discard years ago. See 11 C.F.R. §§ 104.10(a)(4), 104.14(b)(3), 102.9(c). Moreover, the Party has already disgorged substantial sums from its federal account above and beyond the Act's requirements. Further Commission action would thus be imprudent, as well as unwarranted.

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DISCUSSION

A. The Party Complied With the Act When It Timely Disgorged \$50,000 From Its Federal Account.

The first main question before the Commission is whether the Act allows a political party to disgorge the excessive portion of an individual's contribution into its nonfederal account within 60 days of the initial receipt. Because it plainly does, the Commission should take no further action.¹

Commission regulations give political committees up to 60 days to cure an excessive contribution. See 11 C.F.R. § 103.3(b)(3). As the Factual and Legal Analysis notes, the regulations expressly allow political party committees to reattribute the excessive portion of an individual contribution to a spouse within 60 days. See 11 C.F.R. § 110.1(k)(3)(ii)(B). They also expressly allow a principal campaign committee to redesignate the excessive portion to another election within 60 days. See 11 C.F.R. §§ 110.1(b)(3)(i). Because political parties raise funds on a calendar-year basis, and not on a per-election basis, the redesignation rules do not apply to them. See 11 C.F.R. §§ 110.1(b)(3)(i).

The purpose of these rules is simply to "implement the contribution limitations" of the Act. Contribution and Expenditure Limitations and Prohibitions, 52 Fed. Reg. 760. See also 2 U.S.C. § 441a(a)(1)-(2). To the extent that the rules are otherwise concerned with a donor's intent, it is only to protect against the making of a contribution in the name of another. For example, the signed reattribution requirement ensures that each spouse actually intended to make the contribution credited to him or her. See 52 Fed. Reg. at 766.

Redesignation, reattribution and refund are not the only ways to cure what would otherwise be an illegal contribution. For example, the Commission held that payments to the U.S. Treasury "comport with the underlying reason for the refund

¹ Also at issue is the spousal reattribution of \$25,000, and the disposition of another \$5,250. As the Party noted in its response to the Interim Audit Report, it has reattributed, refunded or disgorged these funds.

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rule" of 11 C.F.R. § 103.3(b), and serve to satisfy the regulations' refund requirement. Advisory Opinion 1996-5 (citing MUR 3460).

Commission rules do not expressly address the distinct situation of a political party that raises funds simultaneously for its federal and nonfederal activities. This may be because the Commission's detailed rules on federal and nonfederal allocation were not enacted until after its redesignation and reattribution rules. See Methods of Allocation Between Federal and Non-Federal Accounts, 55 Fed. Reg. 26,058 (1990). Consequently, the rules do not expressly prohibit the transfer of the excessive share of a federal contribution into a nonfederal account, nor do they expressly require a written statement from a contributor to authorize such a transfer.

To the contrary, it follows logically that such transfers are permissible, without any additional writing from the donor, if made within 60 days. There is no question regarding compliance with the Act's contribution limits, because only the lawful portion remains in the federal account. There is no possibility of an illegal contribution in the name of another.

Rather, the only genuine issue is the party's compliance with state law, which itself dictates the manner in which nonfederal contributions may be made. The Commission has consistently deferred to states in the raising and spending of money for nonfederal election purposes. See, e.g., Advisory Opinions 1999-12 and 1986-27 (interpreting the Act to recognize state interests regarding receipts and disbursements for nonfederal election purposes). For the Commission to restrict otherwise lawful nonfederal fundraising would infringe on state prerogatives that the Commission normally respects.

The Party clearly complied with the Act when it disgorged the federally excessive portions of its contributions into its nonfederal account within 60 days. Even the Commission previously characterized the Party's transfers as "timely." Interim Audit Report at 4. The absence of a genuine issue is demonstrated further by the fact that, during the audit process, the Party obtained several letters confirming the donors' intent to support its nonfederal activities.

By seeking enforcement against the Party for these transfers, the Commission errs in two respects. First, the Commission has effectively used the audit and enforcement process to create a new rule. While the Commission initially faulted the Party for failing to obtain written statements from its donors authorizing the transfers,

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the rules contain no such requirement. See Interim Audit Report at 4. The Party had no notice of this new rule, nor did it ever have an opportunity to comment on it. To enforce this purported rule now would be inappropriate. See Statement of Reasons of Commissioners Wold, Elliott, Mason and Sandstrom on the Audits of Dole for President Committee, Inc., et al., at 3-4 (June 24, 1999) ("Rulemaking is not simply the preferred method for filling in gaps in the FECA. It is the required method.").

Second, the sole effect of Commission enforcement would be to restrict the financing of Missouri nonfederal elections, in a departure from prior Commission precedent. See Advisory Opinions 1999-12 and 1986-27. Here, there is no genuine issue regarding the Act's contribution limits, because the excessive funds were "transferred timely." Interim Audit Report at 4. There is no genuine issue regarding the donors' intent, for each plainly intended to support the Party generally. The only effect of Commission enforcement would be to erect an additional barrier to the Party's nonfederal fundraising. That is not an appropriate task for the Federal Election Commission. Rather, it belongs to the Missouri Ethics Commission.

B. The Party Complied With the Act When It Deposited Vendor Refunds Into Its Federal Account.

The second issue in this matter is whether the Party acted appropriately in depositing vendor reimbursements into its federal account, without later transferring a portion of the reimbursement into the nonfederal account. Again, the Commission seeks now to impose rules on the Party that did not exist during the 1995-1996 election cycle.

Commission regulations require state political parties to make their allocable disbursements from a federal account, while using an appropriate ratio of federal and nonfederal funds. See 11 C.F.R. § 106.5. However, the rules do not specifically prescribe how a party is to dispose of a refund that a vendor has made from a previously allocated expense, other than to require its disclosure generally. See 11 C.F.R. § 104.3(a)(4)(v).

The Commission has addressed this question only in an August 1995 advisory opinion, and only tangentially. See Advisory Opinion 1995-22. Then, the subject was complex enough, and the rules unclear enough, that a national political party committee felt compelled to seek approval of the way it allocated and reported vendor refunds. Id. While the Commission approved the proposed method, it observed

without elaboration that "your method is not the only permissible method in such circumstances." Id. At no point did the Commission explicitly state that a transfer to the nonfederal account was actually required. Id.

Nearly half of the vendor refunds were received before the Commission issued Advisory Opinion 1995-22, and thus well before the Party had even the most minimal guidance regarding the disposal of these funds. Of \$39,584 in total refunds, the Party received \$18,625 before August 1995, when the opinion was issued. Yet even during the remainder of the election cycle, the Party still would not necessarily have known precisely how to dispose of the refunds, because the Commission had not clearly spoken on the subject. For example, were a transfer to the nonfederal account required, it is not clear how long the Party would have had to accomplish the transfer. Under the plain language of the regulations, the 70-day window for allocation applies only to transfers from the nonfederal account to a federal account or allocation account. See 11 C.F.R. § 106.5(g)(2).

Again, the Commission seeks to enforce rules that did not exist at the time the transactions occurred, and of which the Party had no notice. While the Commission might wish to augment its allocation rules with a requirement that political parties disgorge portions of their vendor refunds to their nonfederal accounts, it should do so through the rulemaking process, and not through the audit and enforcement processes.

C. The Record Fails to Support Any Violation by the Party of the Commission's Allocation Regulations.

The final main issue before the Commission is whether the Party, which supports both federal and nonfederal candidates, violated the Act by paying for certain expenses entirely from its nonfederal account. Here again, the record fails to present a violation.

As an initial matter, Commission regulations do not require allocation in all circumstances. For example, a state political party need not allocate expenses that relate solely to nonfederal candidate support. See generally 11 C.F.R. Part 106. Moreover, the administrative or generic ballot allocation ratio is not the only ratio that might apply to an expenditure. For example, costs associated with a nonfederal fundraising program might be paid for on a much smaller ratio of federal to nonfederal funds. If the program exclusively raised nonfederal funds, its expenses could be paid entirely with nonfederal funds. See 11 C.F.R. § 106.5(f).

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The Factual and Legal Analysis makes a series of errors as it seeks to impute liability to the Party. First, it ignores the Party's observation that there were three special nonfederal elections during 1995, for which the Party could have made expenses entirely from its nonfederal account. Second, it assumes that all of the expenses at issue were administrative in nature. To the contrary, as the Party noted in its response to the Interim Audit Report, many of the consultants whom it retained to provide "contract services" worked exclusively on nonfederal activities.

Finally, it relies entirely on the absence of Party records to conclude that violations occurred, even though the Party was no longer required to retain records for much of the 1995-1996 election cycle when the Commission commenced its audit on January 12, 1999. See 11 C.F.R. § 102.9(c). From the record now before the Commission, it is just as probable that no violation occurred, as it is that a violation in fact occurred. It would be inappropriate for the Commission to pursue enforcement at this late date, with the facts now before it.

With respect to all of the alleged violations, it must be noted that the Party has taken several significant steps to comply with the recommendations of the Audit staff and the Interim Audit Report, even when it thought those steps unnecessary under the law. For example, the Party requested and received written statements from several donors to confirm their contributions to its nonfederal account, even though it believed that Commission regulations imposed no such requirement.

Moreover, despite the time that had lapsed prior to the audit, the Party provided significant documentation for several of the expenses. Finally, and perhaps most significantly, the Party adopted an allocation ratio for the period January 1999 to May 1999 that significantly overstated the federal share of its administrative and generic ballot expenses, costing the Party approximately \$25,000 extra in federal funds.

In the end, Commission enforcement action rests on untenable grounds. Seizing on areas of ambiguity in its own regulations and relying in part on the absence of documents that are no longer required to be kept, the Commission would enforce new rules against the Party aggressively and retroactively, just before the statute of limitations is set to expire. These are precisely the sort of circumstances that should lead the Commission to exercise its prosecutorial discretion and take no further action, even if it believed that violations had occurred.

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For the foregoing reasons, the Party respectfully requests the Commission to dismiss the pending matter.

Very truly yours,



Brian G. Svoboda
Counsel to the Missouri Democratic Party

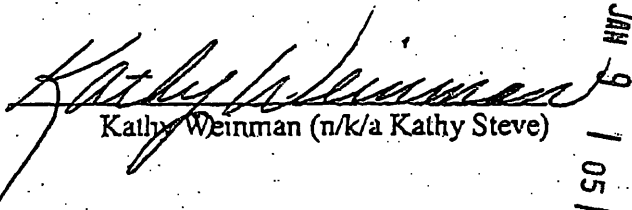
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**AFFIDAVIT OF
KATHY WEINMAN,
n/k/a KATHY STEVE**

I, Kathy Weinman, n/k/a Kathy Steve, duly sworn upon my oath state as follows:

1. I was unaware of the contribution limits imposed by federal law.
2. I was solicited by phone to make a \$25,000 contribution to the Missouri Democratic State Committee ("Committee") in April of 1996.
3. I had worked with members of the Committee to pass legislation to protect battered women and children.
4. Because I was asked by a Committee representative to contribute \$25,000 to the Committee, I did not believe that I was violating any laws.
5. I received a letter from the Committee in November of 1999 that stated that I was only allowed to contribute \$5,000 by law. The letter asked for my permission to redesignate \$20,000 to another political campaign fund. At the bottom of the page, the letter stated that I could request \$20,000 to be refunded.
6. I requested a refund of the \$20,000.
7. After requesting the refund of the excessive portion of the contribution, I received a call from the individual who initially solicited my contribution expressing disappointment in my decision to request a refund.

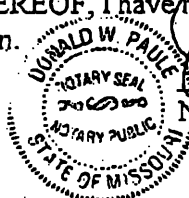

Kathy Weinman (n/k/a Kathy Steve)

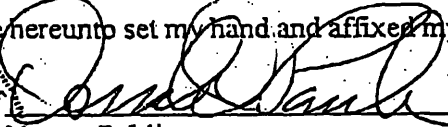
STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

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On this 8th day of January, 2001, before me personally appeared Kathy Weinman, n/k/a Kathy Steve, to me known to be the person described in and who has executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.




Notary Public

My Commission Expires:

DONALD W. PAULE
NOTARY PUBLIC - STATE OF MISSOURI
ST. LOUIS COUNTY
MY COMMISSION EXPIRES JAN. 4, 2001